

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: : Docket #18cv11642
BALIGA, :
Plaintiff, :
- against - :
LINK MOTION INC., et al., : New York, New York
Defendants. : May 24, 2023

-----:
PROCEEDINGS BEFORE
THE HONORABLE VALERIE FIGUEREDO
UNITED STATES MAGISTRATE JUDGE

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None

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None

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THE CLERK: Judge, this is the matter of Baliga
versus Link Motion Inc., case number 18cv11642.

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Counsel, please note your appearance for the
record starting with the plaintiff.

6

MS. MIRIAM G. BAHCALL: Yes, your Honor, Miriam
Bahcall on behalf of the plaintiff, Mr. Baliga.

8

HONORABLE VALERIE FIGUEREDO (THE COURT): Good
morning, Ms. Bahcall.

10

MR. MICHAEL J. MALONEY: Good morning, your
Honor. This is Michael James Maloney, with my partner
Rosanne Felicello on behalf of defendants, Dr. Vincent
Wenyong Shi, and on this motion, Link Motion Inc.

14

THE COURT: Good morning, Mr. Maloney and
Ms. Felicello.

16

MS. ROSANNE FELICELLO: Good morning, your
Honor.

18

THE COURT: So this is a bit of a different
format for an oral argument. There's really one topic
or question that I'd like the parties to just discuss
with me. So you're all aware of the R & R and Judge
Marrero's like limited, basically let's call it a
remand, for purposes of just the state common law fraud
claim. And I don't know if you recall, but in his
Decision and Order at page 39 through 40 he specifically

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2 says neither party had addressed the Affiliated Ute
3 presumption and how the presumption applies, and this is
4 -- I'm quoting what his language is -- "where the
5 securities allegations primarily focus on a failure to
6 disclose but the common law fraud claims targeting the
7 same misstatement and omissions are pled as ground in a
8 more direct theory of reliance."

9 So I know the parties briefed the issue of
10 what's required under the state common law fraud claim.
11 I think, you know, we've extensively reviewed the New
12 York state cases, and it seems pretty clear that you
13 need direct reliance for a state common law fraud claim.
14 In the state courts there's no Affiliated Ute
15 presumption. I think that aspect of it, you know, I
16 don't think we need to discuss today.

17 My focus really is I read Judge Marrero to be
18 saying you've got these federal securities loss claims
19 that for all intents and purposes the Court has already
20 issued an R & R that was predominately based on these
21 material omissions. The R & R was adopted by Judge
22 Marrero. He found that the claim was basically a
23 failure to disclose the related nature of that Tongfang
24 transaction, right? In the statement sending it back to
25 us for the common law fraud claim he seems to be talking

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2 about the common law fraud claims, the state ones, being
3 grounded in a more direct theory of reliance. And so
4 the reason I wanted to talk to the parties is if we are
5 all working on the assumption that for a common law
6 fraud claim you have to plead direct reliance; we're not
7 looking at an Affiliated Ute presumption.

8 How does that work in the context of these
9 allegations here? Because we have at right -- at any
10 point anyone can feel free to chime in -- but we have,
11 you know, the 33 total purchases, which Judge Marrero
12 has already said only 13 are actionable, right? So
13 that's also like not open for discussion. And there's
14 only one -- so the Tongfang transaction is in March of
15 2017. Mr. Baliga makes the one purpose in January 19th
16 of 2018. So that's one purchase after the Tongfang
17 transaction but before the Seeking Alpha report in
18 February of 2018. And then after February of 2018, as
19 you know, he makes several purchases from June through
20 August of 2018.

21 So I guess in a nutshell -- I know I have been
22 talking for a while -- but I want to hear the parties
23 out based on the allegations in the Complaint, you know,
24 for this common law fraud claim where we have to show
25 direct reliance, has Mr. Baliga made out enough. And is

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2 there some disconnect with saying -- this was more
3 fundamentally my question -- is there some disconnect
4 with saying that his federal securities law claims are
5 based on this theory of a material omission; whereas,
6 his state law, state common law fraud claim, is there a
7 disconnect if we potentially say that's grounded more in
8 a direct theory of reliance, i.e., a direct -- he relied
9 on a misrepresentation?

10 MS. BAHCALL: May I respond first --

11 THE COURT: Yes. And, as I said --

12 MS. BAHCALL: -- since I think it's kind of
13 directed at the plaintiff?

14 THE COURT: -- I'm obviously happy to hear from
15 anyone. And, you know, this was really -- I know we're
16 in this setting, but I was hoping to have, you know, an
17 open discussion about this.

18 MS. BAHCALL: Okay, so I think, yes, I think we
19 can state and have state a claim. And we do base
20 reliance, and under New York state law you can base
21 reliance on an omissions claim or a mixed claim. And we
22 think we've done that. And the fact -- it doesn't
23 become -- we're not saying it's a misrepresentation case
24 for the common law fraud claims and it's an omissions
25 case for the securities law claims. It's the same case.

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2 The reason we made it clear -- and I think when we
3 appeared here the last time -- and I reviewed the oral
4 argument -- I'm pretty sure I said we are looking at
5 reliance on three bases, I said -- and it's true, and
6 they're compliant. I mean, it wasn't just something.
7 It was one, we thought we were entitled to fraud on the
8 market for the misreps, for the securities law claim
9 misreps; we thought we were entitled to Affiliated Ute
10 because the securities law claims were predominantly
11 (indiscernible). And then we did say we also had direct
12 reliance under misreps and the omissions, and we did
13 plead that for common law fraud claim, as well and for
14 negligent misrep. And the judge has already found
15 there's no difference in reasonable reliance for
16 negligent misrep and common law fraud. And in the
17 negligent misrep claim you found reliance was adequately
18 pled, and the Court adopted it, and they didn't object.

19 So I think we have -- and we are claiming it is
20 a misrepresentation but mainly an omissions claim, and
21 we're relying on it. And your Court's recognized you
22 can rely on an omission; you have to plead direct
23 reliance, which we've done. And the way it works is --
24 and Mr. Maloney at the last argument, in fact, admitted
25 he understood it from our pleadings. And, after all,

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2 that's what Rule 9(b) is about, that we're saying that
3 Mr. Baliga, which we can do here -- I mean, a lot of the
4 cases go off, and whether you need the presumption,
5 mainly because they're a class action on these
6 certifications, and to have one person did, one person
7 didn't, it's hard to show the whole class read
8 everything. But he understands that -- when I say "he,"
9 I mean she, based on the argument -- we pled that he
10 relied on the statements that came up. He read them; he
11 relied on them.

12

THE COURT: So just to be more specific,
13 because I -- and I have your Second Amended Complaint
14 here -- as I reviewed the Complaint, I thought you pled
15 -- your allegations of direct reliance for purposes of
16 the common law fraud claim, I found at Paragraph 119 and
17 Paragraph 124.

18

MS. BAHCALL: Yeah, we had it in Paragraph --
19 but it was 119, 124, and also Paragraph 2 and 120. So
20 at Paragraph 2: "Baliga has alleged that he relied on
21 defendants' misstatements and omissions concerning the
22 various corporate transactions entered into LKM." 1119:
23 "Baliga specifically alleged that he relied on the
24 material false and misleading statements and omissions
25 alleged herein in reaching investment decisions."

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2 Paragraph 120: "Baliga purchased LKM securities between
3 the time defendants misrepresented or failed to disclose
4 material facts and the time the two facts were disclosed
5 without knowledge of the misrepresented or omitted
6 facts." So --

7 THE COURT: Sorry, that was Paragraph 120?

8 MS. BAHCALL: Yes, Second Amended Complaint. I
9 have -- I may have taken it down wrong, but that's what
10 I have.

11 THE COURT: So --

12 MS. BAHCALL: And 124.

13 THE COURT: Right. And so all of those, again,
14 are -- they're general, right? You're saying he
15 directly relied on the misreps or omissions; you're not
16 giving me specific statements he relied on, you're not
17 providing specific actions he took in reliance on those
18 statements or on the fact that the company hadn't
19 disclosed the related nature of the transaction. One
20 could view those allegations as a bit boilerplate. And
21 so I'm wondering if you have more specific allegations
22 of direct reliance?

23 MS. BAHCALL: Well, I will say that the Court
24 also found that we had, and in fact, Mr. Maloney
25 admitted it, initial admission here, that we went

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2 through and we listed every single fact or disclosure
3 that came out and what they said and what they were in.
4 We gave a laundry list of them and then said he reviewed
5 them. And I will say that, again, at the argument --

6 MS. BAHCALL: But are those -- I'm sorry to cut
7 you off; I just want to make sure that I'm clear on
8 exactly what you're pointing to -- when you talk about
9 those laundry lists of statements, are those all during
10 the -- so I guess near in time or some -- because we're
11 talking about the more limited actionable trades, as
12 Judge Marrero circumscribed them or whatever. We're
13 really talking about some time period before that
14 January 2018 purchase?

15 MS. BAHCALL: Yeah. We list all of them he
16 relied on and the dates.

17 THE COURT: And where do you list that?

18 MS. BAHCALL: Let me find it for you. I have
19 them listed out. Unfortunately, Ms. Soli was supposed
20 to join me and had car trouble, and I told her to bring
21 the Second Amended Complaint so I wasn't just working
22 off of my outline. But I will find it for you.

23 THE COURT: Okay, sure. And I mean, as I said,
24 like this is a bit of an unorthodox format, so if
25 Mr. Maloney or Ms. Felicello want to chime in while

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2 you're looking for it, I'm happy to do a back-and-forth.

3 MR. MALONEY: Yes, your Honor. Thank you.

4 I'd like to address first your question about
5 whether plaintiff has adequately alleged direct reliance
6 here. I submit that the relevant cases before you are
7 the *Doubleline vs. Odebrecht* case and the *In re Fire*
8 *Festival* cases. You know, these cases both address a
9 situation that is very similar to here where plaintiff
10 alleges a laundry list of statements and then alleges
11 that he or she relied on all of them generally in trying
12 to make out a common law New York fraud claim. And the
13 Courts both rejected that argument. The Courts are
14 saying that the plaintiff, in order to make out a New
15 York common law fraud claim must link each purchase with
16 an identifiable statement. And that's direct actual
17 reliance under New York law. And the Courts rejected
18 these general laundry list allegations and boilerplate
19 allegation of direct reliance on that laundry list.
20 That's the correct legal principle here that should be
21 applied, and that's one of the reasons why plaintiff has
22 not been able to adequately allege direct reliance.

23 There's another point that is relevant and
24 which these cases teach us. That is a failure to plead
25 reliance under Rule 8. It does not satisfy even the

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2 minimal requirement of Rule 8, let alone the heightened
3 pleading standard under Rule 9.

4

Both of those cases involved claims where
common law fraud claims were brought also in parallel
with the securities claims. You know, the *Doubleline*
case, in particular, dealt with the presumption issue.
Your Honor has already mentioned that; you don't an
argument on that, so I won't go into that. But those
are the relevant cases here.

11

There's another issue with reliance here, as
well, another defect, we submit. Plaintiff's reliance
must be justifiable. And that means basically that a
reasonable person, you know, could have relied on the
statements that they're claiming to have been
fraudulent. And in this particular case, no transaction
after February 18 could be justifiably -- could be based
on the justifiable reliance on a misstatement here
because that's the time when plaintiff himself alleges
that the truth was disclosed.

21

THE COURT: But what about Shi's affirmative
misrepresentations after the Seeking Alpha report? Why
couldn't he justifiably rely on that?

24

MR. MALONEY: He hasn't alleged that. He's
alleged, again, a laundry list. And he's failed to

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2 connect his purchases to an identifiable statement. And
3 that fails the standard of Rule 8.

4 And then just to make a record here -- I
5 apologize -- but I have the Second Amended Complaint in
6 front of me, and my Paragraph 120 does not read as
7 plaintiff's counsel read it. Paragraph 120 here talks
8 about fraud on the market. I'm sure that's just a typo
9 and there's another paragraph that counsel is referring
10 to.

11 And then I know there are references to
12 judicial admissions. I reject any judicial admissions.

13 MS. BAHCALL: Okay, can I quickly respond?

14 THE COURT: Sure.

15 MS. BAHCALL: So, first of all, in terms of --
16 and, again, I will try to find the Second Amended
17 Complaint -- but the judicial admissions, what I'm
18 talking about here is that in the argument he admitted
19 that by Paragraph 21 means the plaintiff's saying I
20 looked at the SEC filings, I looked at the press
21 releases, etc.

22 He also said that the Complaint sets out --
23 this is transcript at 63 -- "in an organized fashion
24 misrepresentations and omissions he believed to occur."
25 And he said again where plaintiff's saying that he'd

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2 read these things and decided to invest. So he
3 understood it. And that's what the pleading
4 requirements are about.

5 In terms of connecting this list to his
6 purchases, etc., I think, as we explained, I mean the
7 overall admission here that was not cleared up till we
8 filed, which is why the judge allowed and agreed that
9 all the purchases after March 2017 were allowed even
10 though, you know, we've heard that some of it came out,
11 is because we relied on what was in the public, which
12 was basically that it was an arm's length transaction.
13 We didn't know she was on both sides; we didn't know she
14 wasn't going to pay back the money, etc. That is
15 material; it's an omission whether or not, you know,
16 justifiable reliance, as the Court found and you found
17 is an issue of fact. But that was out there. That's
18 what we relied on, that omission.

19 And --

20 THE COURT: Can I just ask you: Isn't that
21 what the -- the fact that she was on both sides of the
22 transaction and it wasn't arm's length, isn't that what
23 Seeking Alpha revealed in February of 2018?

24 MS. BAHCALL: But then -- I may have my -- but
25 then what happened is the company put out a statement

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2 Shi again -- and we believe (indiscernible).

3 THE COURT: But then that's no longer -- why is
4 that no longer -- that's no longer reliance on an
5 omission; it's reliance on a direct misstatement by the
6 company.

7 MS. BAHCALL: You could put it either way. The
8 omission didn't get cleared up or it is another
9 statement, and we said we relied on it.

10 THE COURT: But this -- and this is where I'd
11 like to be more specific, because as I read the
12 Complaint -- and, you know, I understood whatever
13 arguments counsel might have made at the last hearing we
14 had on the motion to dismiss -- I mean, you still need
15 to plead under Rule 9, especially for a fraud claim
16 there's a heightened pleading standard, so it still
17 needs to be contained within the four corners of the
18 Complaint. And so what I'm focused on is when you say
19 that you pled reliance, other than these paragraphs that
20 we've talked about, I think 124, 119, Paragraph 2, and
21 potentially this might be misnumbered 120, those all
22 talk about reliance generally in terms of the statement
23 "we directly relied." But there's no concrete factual
24 allegations to support that statement. So he doesn't go
25 on to say, "I read the statement from Shi; it said this

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2 transaction was actually arm's length, and I relied on
3 that in making my purchase on June 2018." There's
4 nothing like that in the Complaint.

5 MS. BAHCALL: No, it doesn't tie -- you're
6 right -- specific purchases other than saying we
7 purchased all of these. He was buying over time based
8 on the information out there. He didn't -- he claims
9 that based on the information out there, which was the
10 omission which remained and then the, as you said,
11 whether you called it "misrep" or "omission," when Shi
12 then went and tried to claim that Seeking Alpha was
13 wrong, that that was the information that was out there,
14 that he bought on it. But he was buying based on the
15 information that was out there, which was basically that
16 it was -- the transaction was arm's length, not that it
17 never was disclosed by Shi that he was on both sides.
18 So we don't tie it to specific purchases, you're
19 correct. What we do say is there was a material misrep
20 -- I mean a material omission out there, which the Court
21 found -- you did. And we bought securities over time
22 based on that, all the while it wasn't corrected. So
23 they all fall within that period. And that is what, you
24 know, we allege.

25 And because it is an omission, it's hard to

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2 allege ae lot more specifics. We allege that -- and he
3 understood, we reviewed these things, we understood
4 this, and we bought.

5 MR. MALONEY: If I could --

6 MS. BAHCALL: Or we held. I mean, that's
7 another thing. Common law fraud, unlike the securities
8 laws -- and we do allege a holding claim, too -- but the
9 fact is we bought and held our shares believing the
10 information that was out there.

11 THE COURT: Mr. Maloney, I'm going to let you
12 interject -- I just wanted to ask, because you had said
13 it's an omission, it's hard to allege more, and I guess
14 it's a two-part question, but is there any state law,
15 New York state law case that you can point me to or
16 federal case interpreting New York state law on this
17 common law fraud claim that would say that's enough?
18 Because -- and the reason I ask -- and then maybe this
19 is the second part of my question -- I think the parties
20 cite *Towne v. Kingsley*, which is also a common law fraud
21 claim also based on an omission. I believe it was
22 either the Third Department or it was one of the
23 appellate divisions. And that case seems particularly
24 helpful -- yes, it's a Third Department case -- I'm
25 sorry -- particularly helpful because in the context of

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2 the omission there, the Court found that the plaintiff
3 had -- and I understand that was after trial, but it was
4 helpful to see what the Court would rely on for purposes
5 of showing direct reliance in an omission case, right.
6 And there the Court points to all these things that the
7 plaintiff did on the assumption that this property
8 hadn't been transferred and sold without his knowledge.

9 And I read that case as saying like these are
10 the things you could allege to show direct reliance on
11 the failure to disclose a material fact. But I don't --
12 and I'm happy to have you distinguish *Towne* or the like,
13 but there's none of those allegations here or similar
14 allegations.

15 MS. BAHCALL: See, now, we think there is,
16 which is, I think, what we argued in our briefing.
17 These --

18 THE COURT: And what are those allegations?

19 MS. BAHCALL: So, in *Towne* what they say and
20 other New York cases dictate, the element of justifiable
21 reliance is linked to whether the plaintiff has the
22 means available to know by the exercise of ordinary
23 intelligence the truth or real quality of the omission
24 but failed to make this use. So -- and I think she
25 attempted to distinguish *Towne* because it's, you know,

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2 based on the argument that there was no duty to
3 disclose, which the Court found. But we did say and we
4 did allege that it was material the Court found it; that
5 it was Shi on both sides, that we read everything and we
6 didn't know that Shi was on the other side. And that
7 was in --

8 THE COURT: Why didn't the issue --

9 MS. BAHCALL: -- Shi's possession to know that.

10 THE COURT: Right. And I don't dispute that.
11 But why doesn't that go to whether there's -- so, as I
12 read New York state law on this, you both in an omission
13 case -- right?

14 MS. BAHCALL: Yes.

15 THE COURT: An element of a common law fraud
16 claim is you have to plead not only direct reliance but
17 you have to plead a duty when we're talking about an
18 omission. So why isn't the Court's statement about
19 whether they had -- whether the plaintiff had the means
20 available to know by the exercise of ordinary
21 intelligence the truth or the real quality of the
22 subject of the omission but fails to make use of those
23 means, why is that not really the Court talking about
24 the duty to disclose, which itself is like almost a
25 separate or added element when you're talking about the

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2 common law fraud claim in the context of an omission?

3 MS. BAHCALL: And I agree with you. And I do
4 think the Court found that there was a duty to disclose
5 a related-party transaction.

6 THE COURT: But if you agree with me, then, the
7 Court goes on after that and talks about, "Here the jury
8 was provided extensive correspondence between the
9 parties, including letters from defendant to plaintiff
10 expressing defendant's interest in the subject property
11 and a subsequent letter from plaintiff to defendant
12 wherein plaintiff indicated that he was unwilling to
13 transfer ownership of the subject property," this, of
14 course, plaintiff thinking he still had ownership of the
15 subject property. The jury also heard testimony from
16 plaintiff that defendant never asserted that he was the
17 sole owner of the subject property. Plaintiff averred
18 that he did not think that defendant could transfer
19 title of the property."

20 And then you also had a letter approximately 10
21 months after defendant executed the deed transferring
22 the subject property in which plaintiff suggested that
23 the parties sell the subject property and rent space to
24 defendant when he continued to practice" -- these are
25 all things that they introduced as evidence showing

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2 plaintiff's state of mind that showed his reliance on
3 the fact that he thought he still owned the subject
4 property, which was the omission, the fact that he
5 didn't actually own it because defendant had sold it --

6 MS. BAHCALL: Right.

7 THE COURT: But this is all separate from the
8 duty to disclose. This is all things that he pointed to
9 that concretely showed direct reliance on the omission.
10 And so that's what I was asking, like why does this case
11 help you? Because it reads to me as if like the Court
12 is saying you must show both a duty to disclose because
13 we're talking about an omission and not a misstatement;
14 and, in addition, you have to show direct reliance even
15 in an omission case with actual factual allegations that
16 support that.

17 MS. BAHCALL: See, how I read it -- and then,
18 obviously, you know, I don't mean to sort of quibble,
19 but at the pleading stage -- and, again, that was at --

20 THE COURT: At the trial.

21 MS. BAHCALL: -- trial. And the question I
22 understood at trial was whether it was the justifiable
23 reliance element as fraud is not satisfied where the
24 plaintiff has the means available to know by the
25 exercise of ordinary intelligence the truth or the real

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2 quality of the subject of the omission. And that's what
3 the proof went to later on.

4 THE COURT: Well, doesn't that go -- so it's
5 justifiable reliance. So doesn't the fact he relied,
6 and then was it justifiable. And the fact that he
7 couldn't have otherwise gotten the information on his
8 own because it was knowledge exclusively within the
9 defendant's possession, that goes to whether it was
10 justifiable. But he still had allegations that
11 supported reliance.

12 MS. BAHCALL: Right. The way I see it is the
13 reliance -- and, again, this is where, you know,
14 although they haven't -- and I was prepared to actually,
15 before your introduction, talk about I do think the
16 concept of Affiliated Ute, although not the --

17 THE COURT: I mean, I'm happy to go down that
18 road, but I will say --

19 MS. BAHCALL: I know. I know. But my point is
20 it's not that far off in an omissions case like this
21 that at this point they sort of come together because,
22 in order to plead reliance in an omission case like this
23 with Towne, we have to plead that there was an omission,
24 that there was a duty to disclose, and we have to say we
25 justifiably relied on sort of the quality of the

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2 statement and the, you know, the fact in this case, I
3 guess the omission which sort of took away from the
4 quality. But when you then take the next step of
5 whether it was justifiable there is other information
6 out there, I believe that your Honor, and I think the
7 Court as well adopted -- and I'll find it -- is that's
8 an issue of fact. And --

9 THE COURT: Yes. And I don't dispute that.

10 MS. BAHCALL: -- so I think that goes -- those
11 sort of facts we alleged reliance under this case, we
12 alleged that it was justifiable. I mean, granted we say
13 it's justifiable because do we have a debate in fact
14 about why it's justifiable? That's an issue of fact for
15 later on, which is what happened here. Clearly, it got
16 past a motion to dismiss. And then it's at trial. So
17 that's how I think this case absolutely helps us because
18 I think we've shown there was a duty to disclose. I
19 think it was in their possession. You know, whether or
20 not they can show facts later on or something to
21 suggest, you know, it wasn't justifiable because we
22 could have found out, too, or something, I think that's
23 for down the road.

24 That being said, this is the first time -- and,
25 again, it was exception and negligent misrep that the

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2 issue of whether or not we have given enough facts to
3 explain our justifiable reliance or reliance in the case
4 of omission and common law fraud in New York law, I
5 think we did say in our brief we would appreciate the
6 opportunity to amend. And I know, and we're going to
7 hear from him that, yes, we're on the Second Amended
8 Complaint. However, when you go through it, the first
9 Complaint, we were asked to amend to give purchase
10 dates. So we amended specifically for purchase dates;
11 otherwise, it was exactly the same. Issue not raised.
12 So that was the First Amended Complaint. The Second
13 Amended Complaint, the magistrate asked that
14 counsel -- and not that it matters, but it was prior
15 counsel to us -- counsel distinguish between the direct
16 and the derivative claims. So that's how we got to the
17 Second Amended Complaint. This issue is new; and if
18 your Honor would like additional facts on this issue, we
19 would request the opportunity to amend the common law
20 fraud claim to address them.

21 THE COURT: Well, just so there's no ambiguity,
22 it's not so much what I want. I guess, you know, given
23 the cases I've indicated, why I thought *Towne* was
24 somewhat distinguishable -- and I'm not trying to -- I
25 don't want to confuse the issue -- I'm not trying to

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2 reargue justifiable reliance, because as I said in that
3 prior R & R, whether it's justifiable question of fact,
4 I think there's -- it's pretty well established it
5 doesn't get thrown out on a motion to dismiss there --
6 but I'm talking about the direct reliance element, which
7 I think is different from whether the reliance was
8 justifiable. And that's where I see Towne as -- and
9 granted, it's after a jury trial, but I think it gives
10 you a flavor of potentially what you would have had to
11 have alleged to say he directly relied on the omission.
12 So something -- again, because we're talking about the
13 transaction -- it's not the whole 33 transactions; it's
14 starting with the January 2018. And really, if it's an
15 omission, you're really talking about just the one
16 purchase, right? Because in February 2018, arguably
17 everything gets disclosed; and then after that, you're
18 just talking about misrepresentations or, I'm sorry,
19 reliance on Shi's misrepresentation. But, in either
20 case, Mr. Maloney, I didn't give you a chance to chime
21 in.

22

MR. MALONEY: That's okay. You can finish.

23

I'm making notes.

24

THE COURT: No, no, go ahead.

25

MR. MALONEY: Okay. Thank you, your Honor. So

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2 I guess the first place to start here is with
3 plaintiff's argument that Mr. Baliga was relying on
4 everything that was in the public. That is the fraud on
5 the market theory of reliance, which is a presumption
6 permitted under the securities laws but not permissible
7 under the New York common law. Saying that he is
8 relying on everything in the public is saying the same
9 thing as fraud on the market, just not using the words.
10 And so, you know, we reject that argument for that
11 reason.

12 New York law requires direct reliance, as we've
13 established. And the cases we've cited do not make a
14 distinction at the pleading stage between a claim that's
15 based on an affirmative misstatement or a claim of
16 omission, for example, the *Doubleline* case, the
17 *International Fund Management* case that we cite. Those
18 cases both involved allegations of fraudulent
19 misstatements and fraudulent omissions. And there's no
20 distinction about the standard of reliance, direct
21 reliance required under New York law for those claims.
22 So we do submit that plaintiff must link each
23 misstatement/omission with an identifiable statement to
24 meet the standard under New York law and Rule 8.

25 The *Townes* case we do believe is

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2 distinguishable for substantially the same reasons that
3 your Honor has mentioned. The plaintiff in that case
4 established at trial very specific facts demonstrating
5 his direct reliance. And it's not for this Court to
6 assume that he, you know, survived a motion to dismiss
7 in that case based on allegations of general reliance
8 because that's not in the decision. For all we know,
9 the plaintiff in that case alleged all the specific acts
10 in his Complaint in that case and survived a motion to
11 dismiss for that reason.

12 Again, this all leads back to that standard
13 that we see in *Doubleline, In Re Fire Festival*, where
14 the plaintiff must link his purchases, his actions to
15 identifiable misstatements and omissions. He had not
16 done that here. He has, as your Honor noted earlier,
17 asserted a laundry list of statements and then alleged
18 general reliance on all of that information.

19 We recognize that justifiable reliance is an
20 issue of fact. We do think that in certain cases it can
21 be ruled on on a motion to dismiss. We do think this is
22 one of those cases. And we do think actually
23 plaintiff's allegations support that concept here.
24 Right? He's implicitly alleging that he's relying on
25 all the information in the public, which includes that

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2 February 2018 disclosure.

3 We also object to plaintiff's request for an
4 opportunity to amend here. There's been two
5 opportunities to amend. The first amendment was based
6 on the lack of specificity, which is why plaintiff had
7 to allege the transaction dates. Obviously, those
8 transaction dates relates to the securities claim. They
9 also relate to the common law fraud claim. Plaintiff
10 had an adequate opportunity to allege direct reliance in
11 that first amendment and elected not to. Obviously, the
12 record shows the second amendment was primarily related
13 to the question of direct versus derivative claims.
14 It's, nonetheless, an opportunity to amend, and
15 plaintiff declined to provide more allegations of direct
16 reliance. We don't think any further opportunities to
17 amend are appropriate here.

18 It is also worth noting that this case was
19 filed in 2018. It's now 2013 -- 2023, and, you know,
20 the pleading should be resolved at some point, and we
21 don't think an opportunity to amend here is appropriate.

22 THE COURT: I've pretty much asked all my
23 questions. If there's anything either side wants to
24 add?

25 MR. MALONEY: Your Honor, I would like to just

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2 address one minor point. In the briefing, plaintiffs
3 complained that we did also touch on the issue of loss
4 causation. In our reading of the cases, the Courts do
5 consider, they tend to consider reliance on common law
6 fraud claims and loss causation together. We think
7 that's because the analyses overlap; you really can't
8 have one without the other. Reliance is a link in the
9 chain of causation. So in our reading of the cases,
10 they do tend to consider them together. We would submit
11 that the findings as to loss causation on the securities
12 claims do not directly translate to the common law fraud
13 claim because loss causation on securities necessarily
14 relies on the presumptions of reliance. And so, on the
15 securities claims the plaintiff need only show that, you
16 know, the fraud resulted in an economic loss; whereas,
17 in a common law claim a plaintiff must show a complete
18 chain of causation, which includes many of the elements
19 that were talked about in the *Townes* case where the
20 plaintiff had these interactions with the defendant and
21 relied on them and all those things were a link in the
22 chain of causation. I do understand that you want to
23 limit discussion, but I did want to point that out. And
24 I'll refer to our papers.

25 THE COURT: Well, let me ask you if -- it

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2 sounds like what you're saying is it's really almost the
3 -- it's the flip of the same coin -- whatever the
4 analogy is -- it's the same argument, right? Like, if
5 he hasn't pled direct reliance, he's necessarily not
6 going to be able to plead proximate causation.

7 MR. MALONEY: That's how we see it, your Honor,
8 yes. The way we see loss causation is he must first
9 plead facts showing that he read a statement, relied on
10 it in making a purchase and then the purchase resulted
11 in an economic loss. And that's how they overlap.

12 THE COURT: Right. And I think as I've
13 indicated through my questioning, I agree that under
14 state common law fraud, he has to plead direct reliance.
15 We searched the case law extensively, and there just is
16 no state case applying Affiliated Ute. And there's SDNY
17 cases that say it doesn't apply. But I wonder if we
18 don't -- you know, I guess depending on the outcome of
19 the reliance, proximate causation might not even have to
20 be reached, really, because it is really -- like, if
21 there's no direct reliance, it's -- by extension, you're
22 not going to get causation.

23 MR. MALONEY: We agree -- we agree with that
24 analysis.

25 THE COURT: I'm happy to --

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2 MS. BAHCALL: All right, I would just like to
3 say, one, I just want to correct, since we're correcting
4 statements that were made. In the reply Shi represented
5 that the judge had already determined that Baliga's
6 allegations of reliance were sufficient only under the
7 Affiliated Ute theory of reliance. And the judge didn't
8 find that. The judge just recognized and said that --
9 your Honor found that defendants made material omissions
10 but -- that Baliga relied upon in connection with
11 investment decisions but only under -- you only reached
12 the Affiliated Ute issue. He didn't make a
13 determination. So I think it's an open question for the
14 judge, where it was suggested it was closed.

15 And I'd like to close with again -- and I am
16 going to cite a few New York cases -- that Mr. Baliga's
17 allegations are more than sufficient to allow a reliance
18 for a claim under New York common law. New York Courts
19 have held -- and I'm citing again *Towne*, but there are
20 other cases, as well -- that in the context of claims
21 for omissions, the elements of justifiable reliance is
22 inextricably linked to whether the plaintiff has the
23 means available to know by the exercise of ordinary
24 intelligence the truth or the real quality of the
25 subject of the omissions but fails to make use of it.

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2 And the Court found that you were correct, that the
3 error -- the crux of the alleged omissions in the
4 statement of claims was the failure of LKM to disclose
5 Shi's financial interests in the Tongfang transaction or
6 the lack of any clear or direct affiliation between
7 Tongfang, SPC and Tsinghua Tongfang.

8 And then the Court went on to hold that
9 defendants had a duty to disclose regarding the
10 transaction. And the Court also found that Shi's
11 statements -- of omissions regarding the ability to pay
12 were also actionable. So we believe on New York law we
13 have alleged enough. However, if more detail is
14 required on direct reliance, we are prepared to link it
15 up. And we will say that we did not have the ability to
16 know based on the information out there that Shi was on
17 both sides.

18 THE COURT: But so this is, I think, maybe
19 where -- and you should point me to any case you want me
20 to look at that you think is helpful here. And we've
21 already discussed *Towne* and why I think it's
22 distinguishable --

23 MS. BAHCALL: Ad nauseam, I know.

24 THE COURT: No, no, it's all right. But, as I
25 read the state cases and the federal cases that look at

1 PROCEEDING 33
2 the state common law fraud, you know, you have the
3 elements for a common law fraud claim. And if this were
4 a misrepresentation case, you wouldn't even be looking
5 at whether there was a duty to disclose, right? For a
6 common law fraud you would just be looking -- so to
7 state a common law fraud claim in New York, was there a
8 misrepresentation or material omission made for the
9 purpose of inducing the other party to rely upon it,
10 justifiable reliance of the other party on the
11 misrepresentation or material omission, and injury.
12 Those are your basic elements, right?

13 MS. BAHCALL: Correct.

14 THE COURT: If we don't have an omission, we
15 don't even look at a duty to disclose. You don't
16 disagree with me there?

17 MS. BAHCALL: No.

18 THE COURT: Okay. So then let's talk about
19 what happens to these elements in the context of an
20 omission case. And that's where I think the case law is
21 clear that in the omission case you have to have, in
22 addition to these four, a duty to disclose. You don't
23 disagree, right?

24 MS. BAHCALL: No.

25 THE COURT: Okay. So then -- and then,

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2 obviously, there's like the elements that you look at
3 for whether there's a duty or not. And we can argue in
4 this case, you know, it seems Shi was a chairman, board
5 member. Arguably, there's a duty. There might be an
6 issue about whether you've alleged circumstances that
7 establish a duty for Link Motion. But at least as to
8 Shi, I think there might be enough to say there's a
9 duty, right?

10 MS. BAHCALL: Right. The Court found there was
11 a duty --

12 THE COURT: Right.

13 MS. BAHCALL: -- because the securities laws
14 require you to disclose related-party transactions when
15 you disclose a transaction.

16 THE COURT: Right. So -- but now -- but we
17 still have -- again, going back to the fundamental
18 elements of a common law fraud claim, you still have to
19 show justifiable reliance of the other party on the, in
20 this case, omission, plus a duty to disclose. And I
21 think *Towne* makes clear that whether we have a duty to
22 disclose and justifiable reliance are separate and it's
23 not enough to just say there's a duty to disclose and
24 that by extension establishes your factual allegations
25 for justifiable reliance. But I'll point you also

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2 there's an SDNY case that looks at the common law fraud
3 claim. It's 904 Tower Apartment, which I think you said
4 --

5 MS. BAHCALL: Yes, I have that, too.

6 THE COURT: Yes, and so, again, this is another
7 instance where I think if we are examining with the
8 understanding that we've got the four elements for a
9 reliance claim plus duty to disclose in the context of
10 an omission, you've got this case where there's
11 allegations that go directly to justifiable reliance
12 that are separate from the duty to disclose. And those
13 are the fact that the plaintiff stopped looking for
14 alternative living arrangements, performed their other
15 obligations under the purchase agreement, hired a
16 consultant to help perform pre-closing inspection. This
17 was the -- they were trying to purchase an apartment and
18 there was -- it was a material omission case. And
19 there's allegations that the plaintiff took specific
20 actions, being stopped looking for alternative living
21 arrangements, hired this consultant, in reliance on the
22 fact the defendants had not disclosed the existence of
23 these financing agreements, the financing and loans that
24 would affect the value of the apartment. So they
25 thought they were purchasing apartments with a certain

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2 value; defendants didn't disclose a material fact, which
3 is these financing arrangements that would have like
4 changed the value of the property they were purchasing.
5 And thinking that the property was still valued at X,
6 they took these actions, namely, they didn't look for
7 other living arrangements, they hired a consultant.
8 They were going forward with the act of purchasing the
9 property.

10 And that's what -- when you say you would
11 amend -- but that's different than whether there's a
12 duty to disclose. Those are specific actions --

13 MS. BAHCALL: No, agree.

14 THE COURT: Right. So when you were talking
15 just now, you were saying in the -- you've alleged that
16 Mr. Baliga couldn't have known, he didn't have this
17 information, it was -- there's no question that, you
18 know, those allegations all go to whether there's a duty
19 to disclose. But are you going to be able to plead
20 allegations that show Mr. Baliga relied on the fact that
21 he didn't have the omission -- that he didn't have this
22 information, apart from the facts that show there was a
23 duty? Does that make sense?

24 MS. BAHCALL: No, it makes absolute sense. And
25 I think we have and we will, we could give more detail.

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2 But what I was going to is the tests they seem to use in
3 those cases, the two cases we talked about, the New York
4 law cases, is an omissions case. What we have to be
5 able to allege -- and I believe we did, but we would
6 certainly allege it with more specificity if given the
7 chance, is that -- and this goes to justifiable reliance
8 -- that we didn't have -- it was exclusively in their
9 control. They needed to disclose it because we couldn't
10 know.

11 THE COURT: And you've already alleged all
12 that. And I think --

13 MS. BAHCALL: And that's what we're saying is
14 the main thing is required.

15 THE COURT: But that -- okay, so let's -- and,
16 you know, I think those allegations for his inability to
17 find out are there. And as I was trying to indicate, I
18 think they go to whether there was a duty to disclose in
19 the first instance. I'm wondering what specifically you
20 can point to, actions that Baliga took that would show
21 he relied on the fact that he thought this Tongfang
22 transaction was arm's length, was good for the company,
23 was not some way to like take FL Mobil and ShowSelf and
24 like squander the value for the company, etc., whatever
25 you want to describe the transaction as.

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MS. BAHCALL: I got it. So, respectfully, I read that as not whether there's a duty. I think the duty arises as law, etc. It's whether or not we've pled justifiable reliance, that we relied because we couldn't know and they knew. The duty comes, as the judge found, out of the law and also if you give a half-truth, you have to tell the rest of the truth. Right? So that's where that comes.

10

In terms of whether we've relied -- you know, in this case they said, well, what he did in reliance. Well, what we've alleged Mr. Baliga did in reliance. And, again, we could be more specific about it. But clearly, you know, she understood from our pleadings too what we allege is he bought and held shares based on the report that they were going to do an arm's length sale and it was good for the company and etc., etc., and that they were going to pay the money. We bought shares, we held shares, so we didn't sell shares --

20

THE COURT: Well, you only bought -- if we're just talking about you bought shares in reliance on the Tongfang transaction being solid, you only have the one, the January 2018, right?

24

MS. BAHCALL: Well, see, I would say you could do it either as a misrepresentation or omission. We

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2 continue to believe it and we will allege it with more
3 specificity because what we would be able to show is
4 that Mr. Baliga in fact had meetings with Shi's
5 representatives, when this information started to come
6 out, where he was told, "No, it's not true." And so he
7 continued to believe that it was arm's length based on
8 the information he was given. And then they continued
9 to publicly defend, and privately they were sending out
10 emails to investors defending it. So he continued to
11 believe it was arm's length, so he continued to do his
12 regular activity of buying shares over time. And even,
13 by the way, you buy shares at the price. So the fact
14 that you may buy it after some of the information is out
15 doesn't mean you didn't rely; it meant that you wouldn't
16 have ever paid that price had you known that it was on
17 both sides.

18

So we do believe we've alleged he did take
actions based on it. He bought shares, he continued to
hold share, which unlike the securities laws, under
common law fraud we've alleged holding is an action,
too. So I think it goes beyond the one purchase; it
goes throughout that time period, whether you're calling
it an omission or misrepresentation. That's what we
did. I mean, it's not like it's super-complicated where

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2 in some things you kept changing your position and doing
3 other things. We bought shares, we continued to hold
4 shares, we didn't sell shares, we bought more shares, we

5 --

6 THE COURT: Do you have any statements in the
7 Complaint that say that, for instance, "I continued to
8 hold or didn't sell," that link -- specifically,
9 Mr. Baliga continued to hold the shares or didn't sell
10 shares because he believed Shi's statement that this was
11 an arm's-length transaction?

12 MS. BAHCALL: In general sense, yes. If you're
13 asking with -- you're right; we don't say with respect
14 to this purchase we bought it, continuing to believe
15 this. We say over this time period he bought and
16 continued to hold share believing what was out there,
17 that, you know, it was an arm's-length transaction.
18 That is what we say. We do not link up each one and
19 continue to say it each time.

20 THE COURT: And why is that sufficient to meet
21 the specificity requirement for a fraud claim?

22 MS. BAHCALL: Well, I would say, and
23 particularly in this case, because we listed that these
24 other things he -- it didn't really change that much.
25 The information was continuing -- was out there in terms

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2 of it being arm's length and not corrected or defended;
3 that saying it all together, I think is probably
4 adequate because, clearly, the purpose of Rule 9(b)
5 where it says you have to do it with specificity is so
6 that the defendant knows what he's being charged with.
7 And clearly the defendant here knows it. That being
8 said, we can separate it out by transaction. We're
9 going to say a lot of the same things because it
10 remained the same throughout the time period. He
11 continued to believe, based on the information out there
12 when he bought these shares, that it was an arm's-length
13 transaction. He continued to believe it. He continued
14 when he heard this, this came out, he heard this from
15 Shi. So he continued to believe it. But we are
16 prepared to provide that detail.

17

THE COURT: And --

18

MS. BAHCALL: And nothing will be surprise to
19 him. So there's no prejudice. He understands the case.

20

THE COURT: And you indicated you had other
21 communications beyond just the Shi public statement;
22 there were emails to shareholders?

23

MS. BAHCALL: That we can show a direct
24 reliance on, yes.

25

THE COURT: Mr. Maloney, is there anything you

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2 want to add?

3 MR. MALONEY: Yes. Yes, your Honor. On the
4 issue of the duty to disclose in an omissions case, I
5 think, you know, this duty issue is obscuring the real
6 question on the reliance element of the common law fraud
7 claim. You know, like plaintiff's counsel said, you
8 know, the real issue here is when you state the rule is
9 when you state a half-truth, you must tell the full
10 truth. That's really what's going on here. And in this
11 particular case, plaintiff has alleged a laundry list of
12 what they claim to be half-truths because, you know,
13 this information that they allege was omitted from each
14 of those laundry lists of statements. And that's the
15 fundamental flaw with their common law fraud
16 allegations. They must still link up their actions of
17 reliance with the particular half-truths that they're
18 alleging in the Complaint. And they have not done that
19 here. That's not only a Rule 9 deficiency, it's a Rule
20 8 deficiency under *Doubleline* and *In Re Fire Festival*.

21 I'm not aware what specifically plaintiff is
22 referring to about emails to investors, but, you know,
23 emails to the investors are not all that different from,
24 you know, public press releases. So that's simply
25 another example of what plaintiff is alleging to be out

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2 there in the public that he relied on generally and not
3 identifiably. So that also would not satisfy the
4 requirements of Rule 8 as taught in the *Doubleline* and
5 *In Re Fire Festival* cases.

6 THE COURT: So, wait, if he had specifically
7 alleged -- so prior to his June 2018 purchases -- this
8 is after Seeking Alpha comes out and after Shi makes his
9 first, his statement defending the Tongfang transaction,
10 if he says, you know, I read Shi's statement and then
11 had other communications from Shi to investors
12 explaining that the Seeking Alpha report for whatever
13 reason doesn't have the transaction adequately
14 described, I believed the company and still believe that
15 the Tongfang transaction was arm's length and then he
16 continues to buy, you don't think that's enough for
17 reliance?

18 MR. MALONEY: No. No, your Honor. That --

19 THE COURT: And why is that?

20 MR. MALONEY: -- goes back -- I'm sorry.

21 THE COURT: No, no, why is that?

22 MR. MALONEY: That goes back to this
23 essentially fraud on the market theory. Right? This is
24 a reliance on all the information in the market in
25 general. Right? He's talking about the February 2018

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2 Seeking Alpha disclosure, he's talking about the prior
3 disclosures, and he's talking about Dr. Shi's
4 disclosure, all of them together, in general.

5 THE COURT: But he's tying it -- he's -- he's
6 an investor, he's looking at the publicly released
7 statements of the company, and he's tying it to specific
8 actions he took -- because there are specific
9 transactions.

10 MR. MALONEY: Well, first, to be clear, he
11 hasn't alleged that in the Complaint.

12 THE COURT: No, no. Yes, this is --

13 MR. MALONEY: Right? This is all hypothetical?

14 THE COURT: -- a hypothetical.

15 MR. MALONEY: Right. But at the end of the
16 day, you know, he still has knowledge of that February
17 2018 disclosure.

18 THE COURT: So what does he need, then, in
19 your -- in this hypothetical, what does he need to prove
20 -- what does he need to allege direct reliance?

21 MR. MALONEY: To allege direct reliance in this
22 case, he would have to link each purchase with a
23 particular half-truth, as plaintiff's counsel describes
24 it, alleged in the Complaint.

25 THE COURT: So why isn't that linking up the

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2 June 29, 2018, purchase with the half-truths or the
3 misrepresentations from Shi?

4 MR. MALONEY: Because he still has knowledge of
5 those prior disclosures. He can't -- you know, this
6 does overlap with justifiable reliance in a way, right?
7 He has knowledge of the February 2018 disclosure. Then
8 he reads these other statements. Right? And there were
9 other public disclosures that were relevant, as well,
10 also from Seeking Alpha that, you know, tend to go in
11 Shi's favor. So --

12 THE COURT: But why doesn't that go to whether
13 his reliance was justifiable, which again I think, given
14 even this hypothetical, it sounds like that's a factual
15 issue? But that, to me, would be different whether he's
16 -- different from him having said, "I heard these
17 statements from Seeking Alpha and Shi. I believed Shi.
18 And because I believed that he was telling me the truth,
19 I bought these shares"; why is that not sufficient for
20 direct reliance? It may not be justifiable, and that
21 might be an issue you then litigate.

22 MR. MALONEY: The other -- so I think probably
23 the best way to illustrate this is to go back to *In Re*
24 *Fire Festival*. The Court there, you know, talked about
25 the who, what, where, when and how. Right? And there's

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2 a time element here. None of plaintiff's purchases line
3 up with these disclosures. He can't link the purchases
4 to the disclosures. He wasn't considering the
5 disclosures when he made the purchases. We know from
6 plaintiff's briefing that what was really going on is he
7 would just buy when he had cash available. He wasn't
8 considering the disclosures that he received from these
9 various sources alleged in the Complaint, thinking about
10 them and then deciding to make a purchase that evening.

11 THE COURT: So you're basically saying there
12 has to be a tighter temporal connection --

13 MR. MALONEY: Yes.

14 THE COURT: -- between the -- and just remind
15 me when was Shi's misrepresentation -- or the alleged
16 misrepresentation?

17 MR. MALONEY: One moment?

18 MS. BAHCALL: March of 2017.

19 THE COURT: Well, March 2017 is Tongfang.

20 MS. BAHCALL: Oh, in 2018.

21 THE COURT: March 2018? So you're saying
22 between March 2018 and June 29th of 2018, there's too
23 big of a temporal gap?

24 MR. MALONEY: Yes, your Honor, yes.

25 THE COURT: Okay. Is there anything else from

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2 either side?

3 MR. MALONEY: I think I've said for everything
4 I've hoped to say. Thank you.5 MS. BAHCALL: And I would only -- I would say
6 the same. The only thing I would say is to
7 Mr. Maloney's points, one, I don't think there's
8 anything in the law that says you have to buy within a
9 week or a month. The information is out there, it's not
10 corrected, he buys. And in fact, he splits it up
11 because he -- he thinks it's still a good buy based on
12 the information out there. I don't think that that
13 takes away.14 And I think that direct reliance, the
15 information we would provide in the Amended Complaint,
16 that you have an email from Shi after this comes out
17 refuting it. I think that is what direct reliance is,
18 where a lot of these fraud in the market and stuff are
19 to everybody. This is to Baliga. And I think that is
20 the quintessential direct communication he relied on,
21 etc.22 THE COURT: And on the temporal issue, you
23 think it would be sufficient even if the email was sent
24 several months before the purchase?

25 MS. BAHCALL: Well, what I'm saying is the

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2 email that I'm talking about is around the time -- after
3 the disclosure in Seeking Alpha, there was communication
4 saying, you know, showing him that it was in -- again
5 denying the allegations of seeking Alpha, saying it was
6 arm's length, etc. And he truly believed it continued,
7 that it was arm's length.

8 THE COURT: Well, this was super-helpful. I
9 appreciate everyone taking their time. And, you know, I
10 think we'll get a decision out relatively soon. If
11 there's nothing else from either side?

12 MR. MALONEY: No, your Honor.

13 MS. BAHCALL: Thank you for the opportunity.

14 THE COURT: Thank you so much. Yes, no, thank
15 you so much.

16 (Whereupon the matter is adjourned.)

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C E R T I F I C A T E

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I, Carole Ludwig, certify that the foregoing
transcript of proceedings in the United States District
Court, Southern District of New York, Baliga versus Link
Motion Inc., et al., Docket #18cv11642, was prepared
using PC-based transcription software and is a true and
accurate record of the proceedings.

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Signature

Carole Ludwig

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Carole Ludwig

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Date: May 31, 2023

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